

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 141 OF 2015

Smt.Vinodini Digambar Ajgaonkar
and Ors.

..Applicants

Vs

Chitra Alias Kusum Raja Navathe

.. Respondent

Mr. Shailesh Shah, Senior Advocate a/w with Mr. Suresh Sabrad,
Advocate for Applicants.

Mr. Kailash Dewal a/w Mr. Roshan Tanna a/w Mr. Chirag Dave i/b
Legasis Partner, Advocates for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 28/09/2016

PC:

1. Heard Mr.Shailesh Shah, learned senior counsel for the applicants and Mr.Kailash Dewal, learned counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the Judgment and decree dated 22.3.2007 passed by the learned Judge presiding over Court Room No.36 of the Court of Small Causes at Bombay (Bandra Branch) in R.A.E.& R.Suit No.547/2079 of 1982 as also the Judgment and decree dated 1.11.2014 passed by the Appellate Bench of the Small Causes Court in Appeal No. 203 of 2007. By these orders, the Courts

below have dismissed the suit instituted by the plaintiff's predecessor-in-title for recovery of possession of a bungalow built on plot no.2 belonging to Sagarika Cooperative Housing Society Ltd., situate at Juhu Road, Juhu, Bombay (for short 'suit premises').

3. The predecessor-in-title of the applicants D.R.Ajgaonkar, hereinafter referred to as 'plaintiff', had instituted suit for recovery of possession against Raha Nawathe, hereinafter referred to as 'defendant', invoking grounds under sections 12, 13(1)(a), 13(1)(b), 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act') as also Section 13(1)(a) of the Act read with Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P.Act'). The Courts below held that there exists no relationship of landlord and tenant between the parties and consequently the grounds invoked under the Act do not survive for consideration. It is against these orders, the applicants have instituted the present application.

4. In support of this Application, Mr. Shah submitted that sometime in March 1972, the plaintiff and defendant's wife, hereinafter referred to as 'respondent', entered into an oral agreement to enter into an agreement for sale in respect of the suit premises. The total consideration agreed between the

parties was Rs. 8 lakhs. The respondent was to pay 25%, i.e two lakhs by 31.12.1974. By September, 1974, the respondent paid Rs.75,000/- and sought extension for payment of balance consideration. The plaintiff accordingly gave extension to the respondent. He submitted that at the relevant time, the defendant and the respondent were residing on the first floor of the building known as 'Konkan Nagar' at Mahim. They requested the plaintiff to permit them to occupy the suit premises on tenancy basis. Accordingly, in September 1974, the defendant was inducted as tenant on payment of Rs. 2000/- per month towards rent. He submitted that between 1974 and 1980 the defendant paid rent in the sum of Rs.1000/- pm or in the multiples of Rs.1000/- by way of cheque drawn on State Bank of India and Mercantile Co-operative Bank. Between 1974 and 1980 the respondent paid part consideration of Rs.1,60,000/- by cheques drawn on Saraswat Cooperative Bank. He submitted that the fact that the defendant was inducted as a tenant, is clearly borne out from the letter dated 8.4.1980 addressed by the defendant to the plaintiff. The Courts below were, therefore, not justified in holding that there exists no relationship of landlord and tenant between the parties and consequently the Small Causes Court has no jurisdiction to entertain and try the suit.

5. Mr. Shah has taken me through the evidence of PW 1

Moreshwar Rajaram Ajgaonkar, brother of the plaintiff, and in particular paragraph 19 of affidavit in examination in chief dated 28.2.2003 as also paragraph 1 of his examination in chief dated 9.4.2003. He submitted that during the course of examination in chief, PW 1 produced letter dated 8.4.1980. The defendant did not raise any objection for admitting the said document in evidence. The letter dated 8.4.1980 was marked as Exhibit-A. He has also taken me through the evidence of PW 2 (plaintiff) and in particular paragraphs 9 and 11 thereof.

6. Mr. Shah has also taken me through the chart showing payments made by the defendant in the sum of Rs.1000/- pm or in multiples of Rs.1000/- by way of cheque drawn on State Bank of India, Dadar Branch, and Mercantile Cooperative Bank, Bandra Branch. He also invited my attention to payments made by respondent by way of cheque drawn on Saraswat Cooperative Bank. He submitted that this clearly establishes the understanding between the parties to the effect that the defendant in his capacity as a tenant defendant was regularly paying rent in the sum of Rs.1000/- or in multiples of Rs.1000/- by way of cheques drawn on either State Bank of India or Mercantile Cooperative Bank. The respondent was paying part consideration by way of cheques drawn on Saraswat Cooperative Bank. Thus, the case of the plaintiff that the defendant was

inducted as a tenant is substantiated. The Courts below, however, discarded the letter dated 8.4.1980.

7. Mr. Shah submitted that the defendant came with the case that the letter was obtained by exerting undue influence as also playing fraud upon the defendant. The letter was obtained from the defendant by misrepresentation. In view of the defence raised by the defendant, burden squarely laid on the defendant to establish the said case. The defendant, however, did not lead evidence and establish the said defence. He, therefore, submitted that the Courts below committed serious error in dismissing the suit. He submitted that the application requires consideration.

8. On the other hand, Mr Dewal supported the impugned orders. He invited my attention to paragraphs 3 and 4 of the plaint as also paragraphs 1(d) and (e), cross examination of PW 1 Moreswar Ajaonkar, paragraphs 7 and 8 of examination in chief of PW 2-plaintiff and the letter dated 8.4.1980. He submitted that the letter dated 8.4.1980 was never intended to be acted upon and, in fact, was not acted upon. The letter dated 8.4.1980 purportedly addressed by the defendant to the plaintiff recorded that the defendant and respondent have handed over possession of the suit premises to the plaintiff peacefully on 8.4.1980. The said position is not borne out from the material on

record as the plaintiff instituted the suit against the defendant in the year 1982 for recovery of possession of the suit premises. He submitted that the respondent along with defendant was put in possession of the suit premises in part performance of the contract. The payments made by either the defendant or the respondent were towards payment of balance consideration and not towards the rent. The Courts below, after appreciating the evidence on record, have concurrently found that there exists no relationship of landlord and tenant between the parties. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In paragraph 3, the plaintiff contended that in or about March, 1972, the plaintiff intended to sell the suit premises with his leasehold rights in plot no.2. The defendant and respondent who were known to the plaintiff's brother, approached the plaintiff. Respondent gave an offer to the plaintiff to purchase the suit premises for a sum of Rs. 8 lakhs provided certain accommodation was granted to her in payment of the price. The respondent represented the plaintiff that she did not have sufficient funds at that time. The respondent stated that she would purchase the suit property out of her own income.

Hence, she would require some time to pay the entire agreed consideration. She further stated that she would pay about 25% of the agreed price on or before 31.12.1974 after which an agreement for sale would be executed by the plaintiff in her favour treating the said amount as deposit or earnest money towards the price of the suit premises. The sale was to be completed by the end of 1976.

10. In paragraph 4, the plaintiff asserted that by about September, 1974, the respondent paid to the plaintiff in all a sum of Rs. 75,000/-. In 1974, the respondent approached the plaintiff and informed him that due to certain diverse circumstances that it was not possible for her to complete payment of Rs. Two lakhs on or about 31.12.1974 as agreed. At that time, the defendant suggested that he be accepted as monthly tenant of the suit premises only pending completion of sale by the plaintiff in favour of the respondent on her paying balance consideration. It was then agreed that the plaintiff should accept the defendant as monthly tenant in respect of the suit premises for which the defendant agreed to pay monthly rent of Rs.2000/-. At the same time, time to make payment of earnest money of Rs. Two lakhs which was originally fixed as 31.12.1974 was extended. The other portion of the said property including a garage therein was retained by the plaintiff.

11. In paragraph 1(d) of the Written Statement, the defendant contended that he came to know through plaintiff's brother Moreswar Ajgaonkar that the plaintiff intends to sell plot no.2 along with structure thereon. It was agreed that the plaintiff will sell his interest in plot no.2 and structure thereon to the respondent at a price of Rs.2,50,000/- in 1974. Price was to be paid by installments. It was further agreed that the respondent would pay Rs.25,000/- as compensation in lieu of interest on purchase price and conveyance would be executed. Because of intimate relationship between the parties, no written agreement was executed.

12. In paragraph 1(e) of the written statement, the defendant contended that on or about 11.7.1974 the respondent paid Rs.25,000/- by cheque to the plaintiff and further sum of Rs.25,000/- in cash towards said consideration. The plaintiff handed over possession of the suit premises to the respondent. From time to time, the respondent paid Rs. 1,96,000/- by cheque and Rs. 81,000/- in cash aggregating to Rs.2,77,000/- including the sum of Rs.25,000/- as compensation in lieu of interest to the plaintiff. The respondent also paid Rs.2000/- towards costs and expenses for preparation of necessary documents and writings for transferring the interest of the plaintiff in the suit premises. Last payment was made in September, 1980 and thereafter

despite repeated requests, the documents were neither prepared nor executed.

13. Perusal of the pleadings shows that the plaintiff did not refer to the letter dated 8.4.1980 allegedly written by the defendant. This fact assumes importance having regard to the fact that the plaintiff himself was a practicing Advocate and the plaintiff's brother Moreshwar (PW 1) is an Income-tax Consultant.

14. During the course of evidence of PW 1 Moreshwar, he referred to a letter dated 8.4.1980 in paragraphs 19 and 20 of his affidavit in examination in chief dated 28.2.2003 which read thus:

“19. I say that the defendant appeared to me to be sincerely penitent and said that as a test of his bonafide, he would give me a letter of handing over of possession of the suit premises viz. surrender of his tenancy in respect thereof on his letterhead. He brought his letterhead to my office and he himself got the letter typed out by my typist in my office. He signed the same in my presence. While giving me the said letter which was addressed to the plaintiff, the defendant told me that I should keep the said letter with me and use it only if the defendant broke his promise to clear the arrears of rent and if Mrs Nawathe did not pay the balance of the purchase price of the suit premises within a short time. I produce the original letter dated 8.4.1980. The letter has been signed by the defendant in my presence. I identify his signature and the contents of the letter are true and correct. I also produce a xerox copy of the said letter. I pray that both the original letter and its xerox copy may be taken on record and marked as Exhibits and the original may be returned to me by keeping the xerox copy on record of this Hon'ble Court.

20. I say that I kept the letter with me. As the defendant continued to default in payment of rent and as Mrs Nawathe

did not pay the balance of the purchase price, the plaintiff above named served a Notice to quit and of demand upon the defendant and decided to file the suit. As the suit was about to be filed, I showed the letter to the plaintiff, who was of the opinion that the said letter may not have the legal effect of surrender of tenancy. He also told me later on that his Advocate shared the same opinion. I was surprised to learn that the defendant in his written statement had disowned that the tenancy had been created which is contrary to what he himself had admitted in the said letter. The plaintiff will have all details with him, both in regard to the part payment of the purchase price by Mrs Nawathe so also about payment of rent and the default in payment thereof by the defendant."

In the examination-in-chief of PW 1 conducted on 9.4.2003, the letter dated 8.4.1980 was taken on record and marked as Exhibit-A.

15. In cross examination, PW 1 admitted that "it is correct to say that defendant's wife agreed to purchase suit bungalow for Rs. eight lakhs and has made some payment towards the purchase of suit property. It is correct to say that after receipt of part payment of sale, my brother had given possession of suit bungalow to defendant and his wife on my request somewhere in 1973-1974". He reiterated that the statement made in paragraph 4 of the plaint and paragraph 14 of the examination-in-chief of (PW 1) plaintiff are correct. He further volunteered that at the time on his suggestion the defendant agreed to pay rent of the suit premises. He might have made that suggestion in the year 1973-74. He was close to the defendant and not with the

respondent and, therefore, during the transaction between the plaintiff and the respondent, he chose the defendant to be tenant of the suit premises. He admitted that there is no written agreement between the plaintiff and the defendant about tenancy of the suit premises.

16. During the course of his cross examination, PW 1 was put question as regards payment of municipal taxes. The said question and answer reads thus:

Que: I put it to you that since the time of oral agreement to sale the suit property to the wife of the defendant it is she who is paying the municipal taxes of the suit property?

and answer given reads thus:

Ans: I say that sometimes my brother paid Municipal Taxes.

When we have not received rent from defendant my brother had requested defendant to pay municipal taxes.

17. PW 1 was also confronted with the letter dated 8.4.1980. He denied that the plaintiff did not give information and instructions about the letter dated 8.4.1980 to his Advocate while drafting the letter. He denied that they have not shown that letter or disclosed to their Advocate at the time of filing of affidavit of document. He admitted that he had taken lead in oral transaction for sale of the suit premises to the respondent. He further admitted that he suggested the plaintiff to file suit against the

defendant.

18. The plaintiff has heavily relied upon the letter dated 8.4.1980. In order to appreciate the submissions based upon this letter, it is reproduced for ready reference.

“Dated; April 8, 1980

To,
Mr D.R.Ajgaonkar,
Dadar, Bombay.

Dear Sir,

For the last several years we were occupying your house (bungalow) at Juhu. We were quite irregular in paying your rent. We are still to pay your eight months rent. Now we are unable to pay your rent in future and so we are handing over the possession of your bungalow to you today.

Now we have no claim or any right of tenancy etc on your house and we have handed over the possession peacefully to you today.

Thanking you,

Yours faithfully,
Sd/-
(Raja Nawathe);

19. It is material to note that the said letter was not even referred to in the plaint and was introduced in evidence. That apart, I find merit in the submission of Mr Dewal that the said letter was not intended to be acted upon and in fact was not acted upon. It is an admitted position that the defendant did not

hand over possession to the plaintiff on 8.4.1980. The plaintiff instituted suit in the year 1982 for recovery of possession.

20. While dismissing the suit, the Courts below have held that there is no relationship of landlord and tenant between the parties. While arriving at this conclusion, the Courts below have considered several circumstances. As far as the trial Court is concerned, the learned trial Judge has considered this aspect from paragraphs 12 to 16. The learned trial Judge noted that the plaintiff is a practicing Advocate and plaintiff's brother PW 1 was an Income-tax Consultant. It was observed as under:

“... The plaintiff admitted that there was concluded contract for sale of the property. In part performance of the contract the present defendant paid some consideration to him and took the possession of the premises. So, it is admitted fact that the deceased tenant and his wife, viz-present defendant, came to occupy the suit premises pursuant to the agreement of sale. There is no agreement of tenancy. Similarly, no rent receipt has been issued at any time by the plaintiff to the deceased defendant.”

21. The learned trial Judge considered the letter dated 8.4.1980 in paragraphs 13 to 16. It was observed that for the first time PW 1 disclosed the letter dated 8.4.1980. In paragraph 14, the learned trial Judge referred to following circumstances:

1. Letter dated 8.4.1980 was not disclosed in the pleading;
2. The letter was also not disclosed in the correspondence issued by the plaintiff.

3. The Letter was also not mentioned in the list of documents annexed to the plaint;

4. The letter was not disclosed in the affidavit of documents.

22. In paragraph 15, the learned trial Judge observed that while appreciating this letter, all the circumstances relied upon by the defendant cannot be overlooked. The plaintiff by no stretch of imagination can be said to be an ordinary litigant. The plaintiff is a practicing Advocate. It was expected on the part of the plaintiff to make reference in the pleading. In paragraph 16, the learned trial Judge observed that on the basis of this letter, the plaintiff was to obtain possession of the suit premises. There is no explanation as to why possession was not taken by the plaintiff on 8.4.1980. Equally, there is no reference of transaction of sale in the letter. If the letter was to be intended to be brought into existence to put an end to the transaction, there ought to have been some reference to adjustment of the amount towards rent paid by the defendants as and by way of consideration. The said letter is silent on that aspect as well.

23. As far as the Appellate Court is concerned, the said letter is considered in paragraph 16. The Appellate Court observed that PW 1 deposed that defendant had brought letter head from office and he himself got the letter typed out by his typist in the office. He signed the same in his presence. While giving him the said

letter it was addressed to the plaintiff. The defendant told him to use it only if the defendant broke his promise to clear the arrears of rent etc. It means that the letter was not to be acted upon. No reason is given for not referring this letter in the plaint. In paragraph 20 of examination in chief of PW 1 extracted herein above, he stated that he had shown the letter to the plaintiff who was of the opinion that said letter may not have legal effect of surrendering of tenancy. The plaintiff also told him later-on that his Advocate shared the same opinion. The Appellate Court, therefore, observed that all these facts clearly show that the letter is not genuine and cannot be relied upon.

24. In paragraph 17, the Appellate Court reproduced the admissions given by PW 1 which is as under:

“17. The witness (PW 1) admitted that “it is correct to say that after receipt of part payment of sale my brother gave possession of suit bungalow to defendant and his wife on my request somewhere in 1973-74.” “

The Appellate Court thereafter observed that sometime in the year 1973, possession of the suit premises was given to the defendant as they had paid some price of the suit property and not any rent. The Appellate Court also considered that the defendant is paying municipal taxes of the suit property. It was further observed that there is no evidence to show that the rent of the suit premises was fixed at Rs.2000/-. No rent receipts are

issued nor there is tenancy agreement between the parties. In paragraph 20, the Appellate Court observed that the intention of the plaintiff in getting the letter dated 8.4.1980 was only towards security of the amount of sale consideration.

25. Thus, after considering the evidence on record, the Courts below have concurrently held that there is no relationship of landlord and tenant between the parties and that the respondent along with defendant were put in possession of the suit premises in part performance of contract. The findings recorded by the Courts below are based upon evidence on record. Applicants are not in a position to demonstrate that the findings recorded by the Courts below are based on no evidence or that they are contrary to evidence on record. Applicants are also not in a position to demonstrate that no reasonable or prudent person would have arrived at the conclusions other than these of the Courts below. Merely because on the basis of evidence on record another view is possible that itself is no ground for invocation of powers under section 115 of C.P.C. In view thereof, no case is made out for invocation of powers under section 115 of C.P.C. Hence, Application fails and the same is dismissed.

(R.G.KETKAR,J.)